gennes, was not felt at all as early as the beginning of the year 1778, when the treaty was signed. We know now that the intervention of France in the American War would have taken place at all events, precisely as it did, if La Fayette had never existed. But it is fair to say that the publication by the French government of the documents in its archives relating to this subject, by means of which we are enabled to make this positive assertion, has taken place since Mr. Balch wrote his book.

It is in connection with the narrative which describes the expedition sent from France under the Comte de Rochambeau, in 1780, that Mr. Balch has presented the most valuable historical material in his book. He has not only followed that detachment through all its movements, down to the capture of Yorktown, but he has made a careful record of the different regiments which composed it, of the officers who commanded in them, and of the rank held respectively by these. He has also enumerated the ships of war which made up the fleet accompanying Rochambeau's expedition, and has given us the number of guns which each carried, as well as the names of the commanding officers. From this point of view *The French in America* is sure to become a useful hand-book to students of history who seek detailed information in regard especially to the military operations in the United States during the years 1780 and 1781. It would have added greatly to the value of the work if Mr. Balch had written in the same manner an account of the expedition of the Comte d'Estaing, engaged in the operations at Newport in 1778, which he barely mentions.

Mr. Balch's second volume is a catalogue of French officers. It bears unmistakable traces of industry and much careful research in the collection of names and in the short biographical descriptions attached to them, of which its pages are made up. The author has sought to include in it every French officer whose name he found mentioned in the many different narratives and notices of the war which have appeared not only in France but elsewhere. He does not confine himself in this case to the command of General de Rochambeau, but he has added, besides the name of the Comte d'Estaing, those of many Frenchmen who, like La Fayette, were serving in the Continental Army as American officers under commissions from Congress; and he has even opened the lines to admit several foreigners who are not properly to be found under the heading given to his list; as, for example, Pulaski, Steuben, and Kosciusko.

CHARLEMAGNE TOWER, JR.

Cases on Constitutional Law, with notes. By JAMES BRADLEY THAYER, LL. D., Weld Professor of Law at Harvard University. (Cambridge: Charles W. Sever. 1894, 1895. Two vols., pp. lii, 2434.)

THE increasing attention which is being given in all our American law schools to the study of cases actually decided in court has given birth to a new species of legal literature. The process has been one of evolution.

At first, volumes were printed consisting only of a selection of decided cases on particular topics, with nothing to indicate the points determined in each, which could serve to connect one with another. Such compilations were valueless, except for the use of law students in connection with lectures, or other recitations. The more modern method is to introduce each case or group of cases with some general explanation of its subject, and perhaps to preface each with a brief syllabus of its contents.

In Professor Thayer's *Cases on Constitutional Law*, this intercalated matter occupies a considerable part of the work, and gives it a distinctive character. It has been his aim to lead the student to a consideration of the causes of things, and the circumstances out of which the leading decisions, which he gives, grew and took shape. His subject naturally directed his attention particularly to the various determinations of the Supreme Court of the United States upon controverted questions of a public nature, and also to the manner in which the disputed terms, whose meaning they have been called upon to declare, came into the text of the Constitution. The character of the book, therefore, is largely historical.

Every judicial decision of a court of last resort is, in a sense, part of the history of the community in which it sits to administer justice. It is a step in the development of its jurisprudence, and so of its institutions. But where the tribunal is called upon to pronounce upon questions of public government and fundamental law, its words become so distinctly of historical importance that any competent review of such decisions is necessarily a substantial contribution to the better knowledge of the politics of the times.

Professor Thayer has not limited the cases, to which he introduces the student, to those found in the ordinary volumes of judicial reports. One of those, for instance, to which he gives a well-merited prominence is that of *Winthrop* v. *Lechmere*, the materials being gathered mainly from the Collections of the Connecticut and Massachusetts Historical Societies. Connecticut, it will be recollected, by an early statute discarded the English system of primogeniture and provided for the distribution of estates, where no will was left, among all the children of the decedent, reserving to the eldest son only a double portion, in accordance with the Mosaic law. Chief Justice Winthrop of Massachusetts, a large landowner in Connecticut, died intestate early in the last century, and his eldest son claimed the succession by right of English law. The Superior Court of Connecticut pronounced against his claim, and the General Assembly, when appealed to for relief, declined to interfere. Winthrop threatened to bring the matter before the King in Council, and was at once arrested for contempt. He was as good as his word, however, and his appeal was soon brought before the Lords of the Committee for hearing Appeals from the Plantations, by whose decree the colonial statute was pronounced unwarranted by charter and contrary to the laws of England. In the late Mr. Coxe's learned treatise on the Judicial Power, he treats the royal decree, confirming or announcing this decision, as in substance a repeal of

the statute ; but Professor Thayer points out that it was rather, as Winthrop afterwards contended, only an adjudication that the statute was never law, because contrary to the fundamental law of the realm.

The second chapter, on the American fashion of making and altering constitutions, is one of particular value. The origin of the plan of providing for necessary amendments, not by a special convention of the sovereign people, as was the original method, but by a *referendum*, at the instance of the legislature, Professor Thayer concurs with Borgeaud, in his *L'Établissement et la Révision des Constitutions aux États-Unis d'Amérique*, in attributing to the Connecticut Constitution of 1818. The colony of Connecticut, however, may fairly claim to have put this mode of procedure into form, and into practical use, a century and a half before. Its Eleven Fundamental Orders of 1638–1639 were in effect a constitution. They forbade the immediate re-election of the governor for a second term. In consequence of this, it became the custom to elect the governor of one year to be the deputy governor for the next, and *vice versa*. As the first term of Gov. John Winthrop, Jr., however, neared its close, the General Assembly proposed to the freemen of the colony to remove this restriction on re-eligibility, and ordered the secretary to insert the proposition in his next warrant for the choice of representatives, and to call for a popular vote upon it. This was accordingly had, and resulted in carrying the amendment, restoring for the future a " liberty of free choice yearly." [1]

The *Dred Scott* case is made the subject of a very interesting note, in which the statements of Justices Campbell and Nelson, in regard to the points really decided, are contrasted with those made by the late George Ticknor Curtis, in his life of his brother, Justice Curtis ; and the position is taken that the opinion delivered by Chief Justice Taney, in which was contained the much misquoted phrase as to the general opinion in the past on the part of the civilized world, as expressed by their conduct, that negroes had no rights that white men were bound to respect, was in fact the opinion of the chief justice alone, and not of the court.

The topic of Eminent Domain is treated in the sixth chapter with great fulness and learning. Grotius had declared that while the sovereign power could use or destroy any private property for purposes of public utility, it was bound to make good the owner's loss. Bynkershoek was inclined to make the rule of compensation broad enough to include all losses suffered by private individuals for the public good. Our American constitutions first gave a legal sanction, where there had before been simply moral limitations.

But for such a legal sanction, a statute seizing upon private property for public use, and making no provision for compensation, could, Professor Thayer holds, afford no ground for the interposition of the courts. But what is public use? Is it the service of public pleasure? Must, he asks, quoting from Bynkershoek, a subject submit to the loss of his property for

[1] *Papers of the New Haven Colony Historical Society*, Vol. V., p. 182.

the æsthetic gratification of the people or for public decoration, alone? The case of *Kingman* v. *Brockton*, 153 Mass. Rep. 256, is cited in favor of an affirmative answer, provided public and not private gain is the real motive for the appropriation.

Chapter VII., in which Taxation is discussed, takes up the vexed question of the meaning of "direct tax" in American constitutional law. The author agrees with Professor Dunbar, from whom he quotes at length, in holding that we derived the term from the French economists of the last century. Its coming from that source was touched upon by Alexander Hamilton, in his brief in the famous carriage-tax case of *Hylton* v. *the United States*, in 1796. The "physiocrats" of the French school, whose principles formed the basis of the French Revolution, held that agriculture was the only productive employment. The net products of land, in other words, constituted the only fund from which taxes could be drawn, without impoverishing society. Taxes laid on land, therefore, struck directly to the source of supply. If other taxes were laid on other subjects or on other occupations than those of the farmer, they all ultimately fell back on the landowner. Quesnay, Mercier de la Rivière, Turgot, and Condorcet were never weary of preaching these doctrines. Their distinction between direct and indirect taxation was in the directness or indirectness of the incidence of the tax on a single class of persons. Did it touch the landowner, as such, directly? It was a direct tax. Did it touch anything else first? It was an indirect tax.

The physiocrats were not exactly agreed as to what tax was in the strictest sense direct. There were those who denied that any tax on persons was such. Others contended, with more reason, that if a person was taxed *qua* landowner, or land-worker, the burden was properly termed a direct one. Turgot put it thus, in speaking of forms of taxation: —

"Il n'y en a que trois possibles: —

"La directe sur les fonds.

"La directe sur les personnes, qui devient un impôt sur l'exploitation.

"L'imposition indirecte, ou sur les consommations."

"And in the fragment which we have of his *Comparaison de l'Impôt sur le Revenu des Propriétaires et de l'Impôt sur les Consommations*, a memoir prepared for the use of Franklin, a careful analysis of the same purport is made, although the point of formal classification is not reached. Of all writers upon economics in 1787, Turgot was perhaps the one most likely to have the ear of American readers; and, of Americans, Gouverneur Morris and James Wilson were as likely as any to give him their attention. The former had already formed that familiar acquaintance with French literature and politics which made his singular career in Paris possible a few years later, and Wilson had been from 1779 to 1783 accredited as advocate-general of the French nation in the United States. There was, then, an easy and a probable French source for the meaning which they both attached to the phrase introduced by Morris.

"It is to be observed, also, that there were some well-known precedents for levying by apportionment such taxes as those which Morris and Wilson probably had in mind. The French *taille réelle*, a tax on the income of

real property, was laid by apportioning a fixed sum among the provinces and requiring from each its quota, as has been the practice in levying its substitute, the *impôt foncier*, ever since 1790. The *capitation* was also levied in France, before the Revolution, in the same manner. The English land tax, established under William III., had for ninety years presented an example of apportionment among counties and other subdivisions, leaving the rate for each locality to be settled at the point necessary to give the due quota. Other contemporary examples could easily be cited, but these are enough for the present purpose, being necessarily familiar in this country in 1787, and likely to have a strong influence."

We have quoted this passage at length (originally found in Professor Dunbar's article on the "Direct Tax of 1861," published in 1889, *Quart. Jour. Econ.*, III. 436), on account of the strong light which it throws on the discussion regarding the constitutionality of the recent income tax law. From the opinion given by Chief Justice Fuller, in the case involving that question, and deciding it adversely to the government, it would appear that the Supreme Court of the United States took a different view from that of Professors Dunbar and Thayer, and attributed the origin of the term to English soil. The validity of the tax really depended on this question of the historical derivation of a term of political economy. Nothing can illustrate more forcibly the close relations between law and history, amounting often to absolute dependence. Nothing can point more clearly to the necessity of studying law from the historical standpoint, and by historical methods.

Professor Thayer's work, aside from the selection of the cases to be printed, which is made with care and discrimination, is largely, we are almost inclined to say too largely, a mere compilation of authorities. His collection of *Cases on Evidence* was enriched by numerous discussions of the subject in hand from his own pen, many of them taken from occasional articles which he had previously contributed to the *Harvard Law Review*. In the present work, this plan is occasionally, but rarely, followed. Had the book contained more original matter, its value to the student would have been much enhanced. It has now almost too much of a judicial tone. The claims on either side of a disputed question are fairly stated, in case or comment, but then the cause is generally left to the determination of the reader, as if he were to render the verdict, unaided by the opinion of the author. He styles himself, indeed, in his notes, as simply an editor. The conditions of his task, writing as he did as a law teacher for law students, perhaps necessarily imposed a certain reserve. The general reader can only regret that the scope of the work did not permit it to disclose more of the author himself. Whatever Professor Thayer says is well said, and few know as well the full uses of the lessons of history.

SIMEON E. BALDWIN.